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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 44, 46, and 52

[FAR Case 2012-032; Docket No. 2012-0032; Sequence No. 1]

RIN: 9000-AM65

**Federal Acquisition Regulation; Higher-Level Contract
Quality Requirements**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to clarify when to use higher-level quality standards in solicitations and contracts, and to update the examples of higher-level quality standards by revising obsolete standards and adding two new industry standards that pertain to quality assurance for avoidance of counterfeit items. These standards will be used to help minimize and mitigate counterfeit items or suspect counterfeit items in Government contracting.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert 60 days after publication]**

in the **FEDERAL REGISTER**] to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2012-032 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-032." Select the link "Submit a Comment" that corresponds with "FAR Case 2012-032." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-032" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, N.W., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite FAR Case 2012-032, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Marissa Petrusek, Procurement Analyst, at 202-501-0136, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2012-032.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to revise FAR subpart 46.2, Contract Quality Requirements, to ensure that agencies assess the risk of nonconforming items when determining whether higher-level quality standards should be used by the Government and relied on by contractors. These quality standards must be designated in the solicitation and resultant contract. The contractor must also ensure its subcontractors adhere to the quality standards, where appropriate. This case proposes to add this to the list of issues to be considered during contractor purchasing system reviews, referenced in FAR 44.303, to ensure that higher-level quality standards are implemented appropriately by the prime contractor.

Section 818, entitled "Detection and Avoidance of Counterfeit Electronic Parts," of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Pub. L. 112-81, enacted December 31, 2011) requires DoD to issue regulations addressing contractor responsibilities for detecting and avoiding the use or inclusion of counterfeit electronic parts or suspect counterfeit electronic parts.

However, because of the globalization of the marketplace, the problem of counterfeits extends far beyond DoD and electronic parts, posing a supply chain challenge to both Government and industry. Globalization in the marketplace increased the risk of counterfeit items in the government's and industry's supply chain. Globalization raises the risk because of the variations in laws related to commerce and fragments the quality assurance process.

While this rule does not directly implement any specific aspect of section 818, it recognizes the quality, reliability, and safety risk that counterfeit items represent, and adds two examples of higher-level quality standards that respond to the need for quality controls in acquisitions for complex or critical items.

This proposed rule is one of three FAR system proposed rules addressing various aspects of detection and avoidance of counterfeit parts as required by section 818:

1. Defense Federal Acquisition Regulation Supplement Case 2012-D055, entitled "Detection and Avoidance of Counterfeit Electronic Parts," which was published for public comment in the Federal Register at 78 FR 28780 on May 16, 2013.

2. FAR Case 2013-002, entitled "Expanded Reporting of Nonconforming Supplies," is being drafted to require

expanded reporting of nonconforming items in partial implementation of section 818 of the NDAA for FY 2012.

II. Discussion and Analysis

The rule proposes to make the following changes:

- FAR 44.303, Contractors' Purchasing Systems Review, would be revised to add implementation of higher-level quality standards to the areas for evaluation when conducting a contractor's purchasing system review.

- Types of contract quality requirements FAR subsections will change as follows:

- o FAR 46.202-4(a) would be revised to require agencies to establish procedures for determining when higher-level quality standards are appropriate, for determining the risk (both the likelihood and the impact) of receiving nonconforming items, and for advising the contracting officer which higher-level quality standards should be applied on the contract.

- FAR 46.202-4(a)(1) would be revised to add "design" and "testing" to the list of examples of technical requirements requiring control.

- o FAR 46.202-4(b) would be revised to remove outdated or obsolete standards and add new examples of higher-level quality standards, including those related to counterfeit electronic parts and

materials. This list of standards was reviewed and revised based on subject matter experts in quality assurance from across the Government.

- FAR 46.311, Higher-level Contract Quality Requirement, would be revised to clarify that, if the clause is used, the contracting officer shall list one or more higher-level quality standard.

- The clause at FAR 52.246-11, Higher-Level Contract Quality Requirement, would be revised to remove the opportunity for the offeror to select a standard.

III. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because it does not apply to acquisitions for goods or services that are not designated critical by the agency and does not add new reporting requirements.

The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

This case was opened to enable the Government to select appropriate quality standards based on the criticality of the requirement and the risk nonconforming items pose to the accomplishment of an agency's mission in a given acquisition. Based on this analysis, the Government will identify the appropriate quality standards for the procurement. The contractor must ensure that its deliverables meet all the specified quality standards, which also entails ensuring that its subcontractors adhere to the higher level quality standard where appropriate. This case proposes to (a) have the contracting officer specify the higher-level quality requirement(s), as opposed to the contractor selecting a standard from a list and (b) add the implementation of higher-level quality standards to the list of items to be considered during contractor purchasing system reviews. No instances were found in practice where this clause was being used to allow offerors an opportunity to opt-out of a quality standard; therefore, this change is being made, in part, to be consistent with common practice.

We estimate that small businesses that provide critical items directly to the Government or to Government prime contractors may be impacted by this rule, however, there are no statistics or databases that would identify the number of contracts that contain higher-level quality standards and how many of those contracts are awarded to small businesses.

There are no reporting, recordkeeping, or other compliance requirements associated with this proposed

rule. Any such requirements for a contractor purchasing system review have already been addressed in FAR subpart 44.3. The proposed rule will not create new purchasing system review requirements beyond those that already exist. The rule does not duplicate, overlap, or conflict with any other Federal rules. The compliance and reporting requirements associated with the proposed rule have been minimized. DoD, GSA, and NASA have been unable to identify any alternatives that meet the objectives of this rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2012-032) in correspondence.

V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 44, 46, and 52

Government procurement.

Dated: November 26, 2013.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 44, 46, and 52 as set forth below:

1. The authority citation for 48 CFR part 44 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

2. Amend section 44.303 by—

- a. Removing from the end of paragraph (i) "and";
- b. Removing from the end of paragraph (j) the period and adding "; and" in its place; and
- c. Adding paragraph (k).

The added text reads as follows:

44.303 Extent of review.

* * * * *

- (k) Implementation of higher-level quality standards.

PART 46—QUALITY ASSURANCE

3. The authority citation for 48 CFR part 46 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

4. Revise section 46.202-4 to read as follows:

46.202-4 Higher-level contract quality requirements.

(a) Agencies shall establish procedures for determining when higher-level contract quality requirements

are necessary, for determining the risk (both the likelihood and the impact) of receiving nonconforming items, and for advising the contracting officer about which higher-level standards should be applied and included in the solicitation and contract. Requiring compliance with higher-level quality standards is appropriate in solicitations and contracts for complex or critical items (see 46.203(b) and (c)) or when the technical requirements of the contract require—

(1) Control of such things as design, work operations, in-process controls, testing, and inspection; or

(2) Attention to such factors as organization, planning, work instructions, documentation control, and advanced metrology.

(b) When the contracting officer, in consultation with technical personnel and in accordance with agency procedures, finds it is in the Government's interest to require higher-level quality standards be implemented, the contracting officer shall use the clause prescribed at 46.311 to list the applicable standard(s). Examples of higher-level quality standards include, but are not limited to, ISO 9001, ASQ E, ASME NQA-1, SAE AS9100, SAE AS9003, SAE AS5553, and SAE AS6174.

5. Revise section 46.311 to read as follows:

46.311 Higher-level contract quality requirement.

The contracting officer shall insert the clause at 52.246-11, Higher-Level Contract Quality Requirement, in solicitations and contracts when the inclusion of a higher-level contract quality requirement is appropriate and one or more such standards will be included in the clause (see 46.202-4).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. The authority citation for 48 CFR part 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

7. Revise section 52.246-11 to read as follows:

52.246-11 Higher-Level Contract Quality Requirement.

As prescribed in 46.311, insert the following clause:

HIGHER-LEVEL CONTRACT QUALITY REQUIREMENT (DATE)

The Contractor shall comply with the higher-level quality standard(s) listed below.

[Contracting Officer insert the title, number, date, and tailoring (if any) of the higher-level quality standards.]

(End of clause)

[BILLING CODE 6820-EP]

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